

244.102) nor a person's compliance or non-compliance with the requirements of this Regulation shall in itself affect any person's liability under Section 10(b) (15 U.S.C. 78j(b)) of the Securities Exchange Act of 1934 or §240.10b-5 of this chapter.

## **PART 245—REGULATION BLACKOUT TRADING RESTRICTION (Regulation BTR—Blackout Trading Restriction)**

Sec.

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AUTHORITY: 15 U.S.C. 78w(a), unless otherwise noted.

Sections 245.100-245.104 are also issued under secs. 3(a) and 306(a), Pub. L. 107-204, 116 Stat. 745.

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### **§ 245.100 Definitions.**

As used in Regulation BTR (§§245.100 through 245.104), unless the context otherwise requires:

(a) The term *acquired in connection with service or employment as a director or executive officer*, when applied to a director or executive officer, means that he or she acquired, directly or indirectly, an equity security:

(1) At a time when he or she was a director or executive officer, under a compensatory plan, contract, authorization or arrangement, including, but not limited to, an option, warrants or rights plan, a pension, retirement or deferred compensation plan or a bonus, incentive or profit-sharing plan (whether or not set forth in any formal plan document), including a compensatory plan, contract, authorization or arrangement with a parent, subsidiary or affiliate;

(2) At a time when he or she was a director or executive officer, as a result of any transaction or business relationship described in paragraph (a) or (b) of Item 404 of Regulation S-K (§229.404 of this chapter) or, in the case of a foreign

private issuer, Item 7.B of Form 20-F (§249.220f of this chapter) (but without application of the disclosure thresholds of such provisions), to the extent that he or she has a pecuniary interest (as defined in paragraph (l) of this section) in the equity securities;

(3) At a time when he or she was a director or executive officer, as directors' qualifying shares or other securities that he or she must hold to satisfy minimum ownership requirements or guidelines for directors or executive officers;

(4) Prior to becoming, or while, a director or executive officer where the equity security was acquired as a direct or indirect inducement to service or employment as a director or executive officer; or

(5) Prior to becoming, or while, a director or executive officer where the equity security was received as a result of a business combination in respect of an equity security of an entity involved in the business combination that he or she had acquired in connection with service or employment as a director or executive officer of such entity.

(b) Except as provided in §245.102, the term *blackout period*:

(1) With respect to the equity securities of any issuer (other than a foreign private issuer), means any period of more than three consecutive business days during which the ability to purchase, sell or otherwise acquire or transfer an interest in any equity security of such issuer held in an individual account plan is temporarily suspended by the issuer or by a fiduciary of the plan with respect to not fewer than 50% of the participants or beneficiaries located in the United States and its territories and possessions under all individual account plans (as defined in paragraph (j) of this section) maintained by the issuer that permit participants or beneficiaries to acquire or hold equity securities of the issuer;

(2) With respect to the equity securities of any foreign private issuer (as defined in §240.3b-4(c) of this chapter), means any period of more than three consecutive business days during which both:

(i) The conditions of paragraph (b)(1) of this section are met; and

(ii)(A) The number of participants and beneficiaries located in the United States and its territories and possessions subject to the temporary suspension exceeds 15% of the total number of employees of the issuer and its consolidated subsidiaries; or

(B) More than 50,000 participants and beneficiaries located in the United States and its territories and possessions are subject to the temporary suspension.

(3) In determining the individual account plans (as defined in paragraph (j) of this section) maintained by an issuer for purposes of this paragraph (b):

(i) The rules under section 414(b), (c), (m) and (o) of the Internal Revenue Code (26 U.S.C. 414(b), (c), (m) and (o)) are to be applied; and

(ii) An individual account plan that is maintained outside of the United States primarily for the benefit of persons substantially all of whom are non-resident aliens (within the meaning of section 104(b)(4) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1003(b)(4))) is not to be considered.

(4) In determining the number of participants and beneficiaries in an individual account plan (as defined in paragraph (j) of this section) maintained by an issuer:

(i) The determination may be made as of any date within the 12-month period preceding the beginning date of the temporary suspension in question; provided that if there has been a significant change in the number of participants or beneficiaries in an individual account plan since the date selected, the determination for such plan must be made as of the most recent practicable date that reflects such change; and

(ii) The determination may be made without regard to overlapping plan participation.

(c)(1) The term *director* has, except as provided in paragraph (c)(2) of this section, the meaning set forth in section 3(a)(7) of the Exchange Act (15 U.S.C. 78c(a)(7)).

(2) In the case of a foreign private issuer (as defined in § 240.3b-4(c) of this chapter), the term *director* means an individual within the definition set forth in section 3(a)(7) of the Exchange Act

who is a management employee of the issuer.

(d) The term *derivative security* has the meaning set forth in § 240.16a-1(c) of this chapter.

(e) The term *equity security* has the meaning set forth in section 3(a)(11) of the Exchange Act (15 U.S.C. 78c(a)(11)) and § 240.3a11-1 of this chapter.

(f) The term *equity security of the issuer* means any equity security or derivative security relating to an issuer, whether or not issued by that issuer.

(g) The term *Exchange Act* means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(h)(1) The term *executive officer* has, except as provided in paragraph (h)(2) of this section, the meaning set forth in § 240.16a-1(f) of this chapter.

(2) In the case of a foreign private issuer (as defined in § 240.3b-4(c) of this chapter), the term *executive officer* means the principal executive officer or officers, the principal financial officer or officers and the principal accounting officer or officers of the issuer.

(i) The term *exempt security* has the meaning set forth in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)).

(j) The term *individual account plan* means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account, except that such term does not include a one-participant retirement plan (within the meaning of section 101(i)(8)(B) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(8)(B))), nor does it include a pension plan in which participation is limited to directors of the issuer.

(k) The term *issuer* means an issuer (as defined in section 3(a)(8) of the Exchange Act (15 U.S.C. 78c(a)(8))), the securities of which are registered under section 12 of the Exchange Act (15 U.S.C. 78j) or that is required to file reports under section 15(d) of the Exchange Act (15 U.S.C. 78o(d)) or that files or has filed a registration statement that has not yet become effective

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under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) and that it has not withdrawn.

(l) The term *pecuniary interest* has the meaning set forth in § 240.16a-1(a)(2)(i) of this chapter and the term *indirect pecuniary interest* has the meaning set forth in § 240.16a-1(a)(2)(ii) of this chapter. Section 240.16a-1(a)(2)(iii) of this chapter also shall apply to determine pecuniary interest for purposes of this regulation.

### § 245.101 Prohibition of insider trading during pension fund blackout periods.

(a) Except to the extent otherwise provided in paragraph (c) of this section, it is unlawful under section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7244(a)(1)) for any director or executive officer of an issuer of any equity security (other than an exempt security), directly or indirectly, to purchase, sell or otherwise acquire or transfer any equity security of the issuer (other than an exempt security) during any blackout period with respect to such equity security, if such director or executive officer acquires or previously acquired such equity security in connection with his or her service or employment as a director or executive officer.

(b) For purposes of section 306(a)(1) of the Sarbanes-Oxley Act of 2002, any sale or other transfer of an equity security of the issuer during a blackout period will be treated as a transaction involving an equity security “acquired in connection with service or employment as a director or executive officer” (as defined in § 245.100(a)) to the extent that the director or executive officer has a pecuniary interest (as defined in § 245.100(l)) in such equity security, unless the director or executive officer establishes by specific identification of securities that the transaction did not involve an equity security “acquired in connection with service or employment as a director or executive officer.” To establish that the equity security was not so acquired, a director or executive officer must identify the source of the equity securities and demonstrate that he or she has utilized the same specific identification for any purpose related to the transaction (such as tax report-

ing and any applicable disclosure and reporting requirements).

(c) The following transactions are exempt from section 306(a)(1) of the Sarbanes-Oxley Act of 2002:

(1) Any acquisition of equity securities resulting from the reinvestment of dividends in, or interest on, equity securities of the same issuer if the acquisition is made pursuant to a plan providing for the regular reinvestment of dividends or interest and the plan provides for broad-based participation, does not discriminate in favor of employees of the issuer and operates on substantially the same terms for all plan participants;

(2) Any purchase or sale of equity securities of the issuer pursuant to a contract, instruction or written plan entered into by the director or executive officer that satisfies the affirmative defense conditions of § 240.10b5-1(c) of this chapter; provided that the director or executive officer did not enter into or modify the contract, instruction or written plan during the blackout period (as defined in § 245.100(b)) in question, or while aware of the actual or approximate beginning or ending dates of that blackout period (whether or not the director or executive officer received notice of the blackout period as required by Section 306(a)(6) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7244(a)(6))).

(3) Any purchase or sale of equity securities, other than a Discretionary Transaction (as defined in § 240.16b-3(b)(1) of this chapter), pursuant to a Qualified Plan (as defined in § 240.16b-3(b)(4) of this chapter), an Excess Benefit Plan (as defined in § 240.16b-3(b)(2) of this chapter) or a Stock Purchase Plan (as defined in § 240.16b-3(b)(5) of this chapter) (or, in the case of a foreign private issuer, pursuant to an employee benefit plan that either (i) has been approved by the taxing authority of a foreign jurisdiction, or (ii) is eligible for preferential treatment under the tax laws of a foreign jurisdiction because the plan provides for broad-based employee participation); provided that a Discretionary Transaction that meets the conditions of paragraph (c)(2) of this section also shall be exempt;

(4) Any grant or award of an option, stock appreciation right or other equity compensation pursuant to a plan that, by its terms:

(i) Permits directors or executive officers to receive grants or awards; and

(ii) Either:

(A) States the amount and price of securities to be awarded to designated directors and executive officers or categories of directors and executive officers (though not necessarily to others who may participate in the plan) and specifies the timing of awards to directors and executive officers; or

(B) Sets forth a formula that determines the amount, price and timing, using objective criteria (such as earnings of the issuer, value of the securities, years of service, job classification, and compensation levels);

(5) Any exercise, conversion or termination of a derivative security that the director or executive officer did not write or acquire during the blackout period (as defined in §245.100(b)) in question, or while aware of the actual or approximate beginning or ending dates of that blackout period (whether or not the director or executive officer received notice of the blackout period as required by Section 306(a)(6) of the Sarbanes-Oxley Act of 2002); and either:

(i) The derivative security, by its terms, may be exercised, converted or terminated only on a fixed date, with no discretionary provision for earlier exercise, conversion or termination; or

(ii) The derivative security is exercised, converted or terminated by a counterparty and the director or executive officer does not exercise any influence on the counterparty with respect to whether or when to exercise, convert or terminate the derivative security;

(6) Any acquisition or disposition of equity securities involving a bona fide gift or a transfer by will or the laws of descent and distribution;

(7) Any acquisition or disposition of equity securities pursuant to a domestic relations order, as defined in the Internal Revenue Code or Title I of the Employment Retirement Income Security Act of 1974, or the rules thereunder;

(8) Any sale or other disposition of equity securities compelled by the laws

or other requirements of an applicable jurisdiction;

(9) Any acquisition or disposition of equity securities in connection with a merger, acquisition, divestiture or similar transaction occurring by operation of law; and

(10) The increase or decrease in the number of equity securities held as a result of a stock split or stock dividend applying equally to all securities of that class, including a stock dividend in which equity securities of a different issuer are distributed; and the acquisition of rights, such as shareholder or pre-emptive rights, pursuant to a pro rata grant to all holders of the same class of equity securities.

**§ 245.102 Exceptions to definition of blackout period.**

The term "blackout period," as defined in §245.100(b), does not include:

(a) A regularly scheduled period in which participants and beneficiaries may not purchase, sell or otherwise acquire or transfer an interest in any equity security of an issuer, if a description of such period, including its frequency and duration and the plan transactions to be suspended or otherwise affected, is:

(1) Incorporated into the individual account plan or included in the documents or instruments under which the plan operates; and

(2) Disclosed to an employee before he or she formally enrolls, or within 30 days following formal enrollment, as a participant under the individual account plan or within 30 days after the adoption of an amendment to the plan. For purposes of this paragraph (a)(2), the disclosure may be provided in any graphic form that is reasonably accessible to the employee; or

(b) Any trading suspension described in §245.100(b) that is imposed in connection with a corporate merger, acquisition, divestiture or similar transaction involving the plan or plan sponsor, the principal purpose of which is to permit persons affiliated with the acquired or divested entity to become participants or beneficiaries, or to cease to be participants or beneficiaries, in an individual account plan; provided that the persons who become participants or beneficiaries in an individual account

plan are not able to participate in the same class of equity securities after the merger, acquisition, divestiture or similar transaction as before the transaction.

**§ 245.103 Issuer right of recovery; right of action by equity security owner.**

(a) *Recovery of profits.* Section 306(a)(2) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7244(a)(2)) provides that any profit realized by a director or executive officer from any purchase, sale or other acquisition or transfer of any equity security of an issuer in violation of section 306(a)(1) of that Act (15 U.S.C. 7244(a)(1)) will inure to and be recoverable by the issuer, regardless of any intention on the part of the director or executive officer in entering into the transaction.

(b) *Actions to recover profit.* Section 306(a)(2) of the Sarbanes-Oxley Act of 2002 provides that an action to recover profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any equity security of the issuer in the name and on behalf of the issuer if the issuer fails or refuses to bring such action within 60 days after the date of request, or fails diligently to prosecute the action thereafter, except that no such suit may be brought more than two years after the date on which such profit was realized.

(c) *Measurement of profit.* (1) In determining the profit recoverable in an action undertaken pursuant to section 306(a)(2) of the Sarbanes-Oxley Act of 2002 from a transaction that involves a purchase, sale or other acquisition or transfer (other than a grant, exercise, conversion or termination of a derivative security) in violation of section 306(a)(1) of that Act of an equity security of an issuer that is registered pursuant to section 12(b) or 12(g) of the Exchange Act (15 U.S.C. 78f(b) or (g)) and listed on a national securities exchange or listed in an automated inter-dealer quotation system of a national securities association, profit (including any loss avoided) may be measured by comparing the difference between the amount paid or received for the equity security on the date of the transaction during the blackout period and the av-

erage market price of the equity security calculated over the first three trading days after the ending date of the blackout period.

(2) In determining the profit recoverable in an action undertaken pursuant to section 306(a)(2) of the Sarbanes-Oxley Act of 2002 from a transaction that is not described in paragraph (c)(1) of this section, profit (including any loss avoided) may be measured in a manner that is consistent with the objective of identifying the amount of any gain realized or loss avoided by a director or executive officer as a result of a transaction taking place in violation of section 306(a)(1) of that Act during the blackout period as opposed to taking place outside of such blackout period.

(3) The terms of this section do not limit in any respect the authority of the Commission to seek or determine remedies as the result of a transaction taking place in violation of section 306(a)(1) of the Sarbanes-Oxley Act.

**§ 245.104 Notice.**

(a) In any case in which a director or executive officer is subject to section 306(a)(1) of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7244(a)(1)) in connection with a blackout period (as defined in § 245.100(b)) with respect to any equity security, the issuer of the equity security must timely notify each director or officer and the Commission of the blackout period.

(b) For purposes of this section:

(1) The notice must include:

(i) The reason or reasons for the blackout period;

(ii) A description of the plan transactions to be suspended during, or otherwise affected by, the blackout period;

(iii) A description of the class of equity securities subject to the blackout period;

(iv) The length of the blackout period by reference to:

(A) The actual or expected beginning date and ending date of the blackout period; or

(B) The calendar week during which the blackout period is expected to begin and the calendar week during which the blackout period is expected to end, provided that the notice to directors and executive officers describes

how, during such week or weeks, a director or executive officer may obtain, without charge, information as to whether the blackout period has begun or ended; and provided further that the notice to the Commission describes how, during the blackout period and for a period of two years after the ending date of the blackout period, a security holder or other interested person may obtain, without charge, the actual beginning and ending dates of the blackout period.

(C) For purposes of this paragraph (b)(1)(iv), a *calendar week* means a seven-day period beginning on Sunday and ending on Saturday; and

(v) The name, address and telephone number of the person designated by the issuer to respond to inquiries about the blackout period, or, in the absence of such a designation, the issuer's human resources director or person performing equivalent functions.

(2) (i) Notice to an affected director or executive officer will be considered timely if the notice described in paragraph (b)(1) of this section is provided (in graphic form that is reasonably accessible to the recipient):

(A) No later than five business days after the issuer receives the notice required by section 101(i)(2)(E) of the Employment Retirement Income Security Act of 1974 (29 U.S.C. 1021(i)(2)(E)); or

(B) If no such notice is received by the issuer, a date that is at least 15 calendar days before the actual or expected beginning date of the blackout period.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, the requirement to give advance notice will not apply in any case in which the inability to provide advance notice of the blackout period is due to events that were unforeseeable to, or circumstances that were beyond the reasonable control of, the issuer, and the issuer reasonably so determines in writing. Determinations described in the preceding sentence must be dated and signed by an authorized representative of the issuer. In any case in which this exception to the advance notice requirement applies, the issuer must provide the notice described in paragraph (b)(1) of this section, as well as a copy of the written determination,

to all affected directors and executive officers as soon as reasonably practicable.

(iii) If there is a subsequent change in the beginning or ending dates of the blackout period as provided in the notice to directors and executive officers under paragraph (b)(2)(i) of this section, an issuer must provide directors and executive officers with an updated notice explaining the reasons for the change in the date or dates and identifying all material changes in the information contained in the prior notice. The updated notice is required to be provided as soon as reasonably practicable, unless such notice in advance of the termination of a blackout period is impracticable.

(3) Notice to the Commission will be considered timely if:

(i) The issuer, except as provided in paragraph (b)(3)(ii) of this section, files a current report on Form 8-K (§249.308 of this chapter) within the time prescribed for filing the report under the instructions for the form; or

(ii) In the case of a foreign private issuer (as defined in §240.3b-4(c) of this chapter), the issuer includes the information set forth in paragraph (b)(1) of this section in the first annual report on Form 20-F (§249.220f of this chapter) or 40-F (§249.240f of this chapter) required to be filed after the receipt of the notice of a blackout period required by 29 CFR 2520.101-3(c) within the time prescribed for filing the report under the instructions for the form or in an earlier filed report on Form 6-K (§249.306).

(iii) If there is a subsequent change in the beginning or ending dates of the blackout period as provided in the notice to the Commission under paragraph (b)(3)(i) of this section, an issuer must file a current report on Form 8-K containing the updated beginning or ending dates of the blackout period, explaining the reasons for the change in the date or dates and identifying all material changes in the information contained in the prior report. The updated notice is required to be provided as soon as reasonably practicable.